

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

GARY QUINTON CARMICHAEL

vs.

FREDERIC W. GEISENDORFF AND
BILLIE GEISENDORFF

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CASE NO. 2:09-CV-181-TJW-CE

ORDER

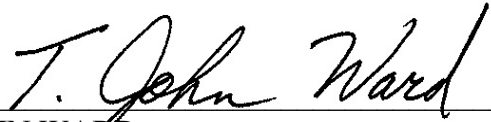
The above-titled and numbered civil action was referred to United States Magistrate Judge Chad Everingham pursuant to 28 U.S.C. § 636. The report of the Magistrate Judge (Dkt. No. 45), which contains his recommendation that the court deny the defendants Frederic W. Geisendorff's and Billie Geisendorffs' motion for summary judgment (Dkt. No. 26), has been presented for consideration. The report and recommendation concluded that the defendants had not established when the malicious prosecution cause of action accrued, because the statute of limitations on the underlying criminal charge may have been tolled by the plaintiff Gary Carmichael's absence from the state.

The defendants filed an objection to the report and recommendation (Dkt. No. 48). Mr. and Ms. Geisendorff argue that "In this case [] Plaintiff, the non-movant, never raised the absence from the state tolling statute or presented any evidence to raise a fact issue with respect to the absence from the state tolling of limitations. Accordingly, Defendants never had the burden of negating the applicability of the absence from the state statute." (Dkt. No. 48 at 2).

After entry of the report and recommendation, the plaintiff filed an amended complaint (Dkt. No. 46), which alleges tolling due to absence from the state. Thus, even assuming that Mr. Carmichael had the burden to allege tolling, the live pleading raises this issue. As such, the court

is of the opinion that the conclusions of the Magistrate Judge are correct. Therefore, the court adopts, in its entirety, the report of the United States Magistrate Judge as the conclusions of this court. Accordingly, the defendants' motion for summary judgment is DENIED.

SIGNED this 20th day of September, 2010.

A handwritten signature in black ink, reading "T. John Ward", is written over a horizontal line.

T. JOHN WARD
UNITED STATES DISTRICT JUDGE